United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1082

B P/S

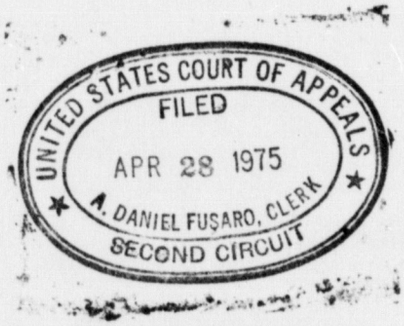
To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- MARIE WILEY and NATHANIEL JAMES, Appellants.	Docket No. 75-1082

BRIEF FOR APPELLANT
NATHANIEL JAMES

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable John M. Canella) entered on March 13, 1975, after a jury trial convicting appellant of conspiracy to possess cocaine with intent to distribute (21 U.S.C. §§841 (a)(1), 841(b)(1)(A), and 846.) Appellant was sentenced to a term of three years imprisonment and a three year term of special parole.

This Court continued the Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Appellant was charged along with Marie Wiley and Charles Clark* in a four-count indictment** with conspiracy to possess and distribute cocaine (count 1), and with three substantive counts of possession with intent to distribute cocaine on October 17, 1973 (count 2); on October 24, 1973 (count 3); and October 31, 1973 (count 4). At the close of the Government's case, Judge Cannella, characterizing this prosecution as a "lousy case", entered a judgment of acquittal for appellant on counts 2 and 3 (105***). The jury acquitted appellant of count 4 (196).

The Government's case consisted of the testimony of Dorothy Johnson, an undercover police detective (18-85), and surveillance officers Stanley R. Martin, a New York City police officer (85-94), and Thomas Fekete, a Special Agent with the Drug Enforcement Administration.****

Dorothy Johnson testified that on October 17, 1973, posing as a potential cocaine customer, she met Marie Wiley

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* Clark's trial was severed.

** The indictment is annexed as "B" to appellant's joint appendix

*** Numerals in parenthesis are to pages in the trial transcript.

**** The Government also introduced a stipulation to establish that the Government chemist, if called, would testify that the substances received from Charles Clark were cocaine hydrochloride.

at the Blue Rose Bar on Amsterdam Avenue. Wiley told Johnson that Charles Clark had sent Wiley there to make the sale.* Johnson however, declined to deal with Wiley, insisting instead that Clark, whom she trusted, participate in the sale (19-20).

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* Trial counsel's request that the jury be directed that these statement were admissible only against Wiley produced in pertinent part the following instruction to the jury:

> Now we come to the point that involves this exception here. If it is established beyond a reasonable doubt that a conspiracy existed and that the defendant was one of the members, then the acts and declarations of any other member of such conspiracy, in or out of the defendant's presence done in furtherance of the object of the conspiracy and during its existance, may be considered as evidence against the defendant. When men enter into an agreement for an unlawful purpose they become agents for one another.
>
> * * *
>
> In reference to this particular objection made by counsel, and he has a right to make it, what he is saying is that at this point we have not proved the conspiracy yet, therefore, anything that one of these people says should only be used against that person. If we had to try a case that way it would be like trying to lift up a rug all at one time, so what we do when we try a conspiracy case is take evidence subject to connection. In other words, if you find that there was a conspiracy, and you find that the particular defendant involved was a member of the conspiracy, then these acts and declarations, if they are made in furtherance of the conspiracy, may be used against that particular person.

Wiley left the bar and returned shortly thereafter with Clark (24). Negotiations for the purchase of one ounce of cocaine ensued. Clark and Johnson then left the bar, and after being joined by an unidentified man, known only as "Blind", the three drove to various locations in Manhattan* where Clark would leave Johnson alone in the car, disappear for a few minutes and then return to drive elsewhere. Finally after leaving Johnson alone at the Red Carpet Lounge, the sixth stop of the evening, Clark reappeared with the drugs (25-27).

On October 24, 1973, again at the Blue Rose Bar, Johnson met with Clark and Wiley. After a discussion with Clark about the sale of another ounce of cocaine, the three left the bar and drove, in Johnson's car, to West 88th Street

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(Fn. Continued from last page) . . .

> So I take the evidence subject to connection. If the evidence is not connected, then the lawyer can move to strike it, and <u>if it is not connected, I will grant the motion. Then you will be told to disregard it</u>.
>
> <u>On the other hand, if the conspiracy is shown</u>, and the defendant's participation in it, then these acts and declarations will be considered by you as far as the proof in the case. (23-24)

* At one of these locations they were joined by a fourth unnamed man whose identity was still unknown to Johnson (26-27).

where Clark gave Johnson the drugs (32-33).

On October 31, 1973, according to Johnson, she returned once more to the Blue Rose Bar where she had previously agreed to meet Clark (38). Clark arrived with two other men, one who remained unidentified, and appellant, who was introduced to Johnson as "Nat" (39). This was the first time Johnson had seen appellant. He was not present during her prior meetings with Clark and she had not heard of his existance prior to the 31st (69). Johnson, Clark and appellant left the bar and drove to 104th Street and West End Avenue. Clark and Johnson sat in the front seat, appellant sat in the back (71). At this destination, Clark and appellant left Johnson in the car. When the two returned Clark said that if Johnson wanted "good coke" she would have to wait for it and further that the reason he would not remain in that location was because "people were shooting up there" and he feared the police (40). Appellant said nothing.

The three drove back to the Blue Rose Bar. While they were in the bar, both Clark and appellant left the group at different times to make phone calls (41). Clark was the one who informed Johnson they would have to wait a while (54).

During this period of time, Johnson asked Clark who appellant was. Over objection by trial counsel, Johnson was permitted* to testify that Clark said appellant was "a trusted friend," that he was his tester, and that while Clark was away, appellant would be handling business for him (54-55).

Later that evening after talking with another unidentified man, Clark told Johnson that they would be leaving to pick up the package. Johnson, Clark and appellant then drove to the Casbah Lounge. Clark told Johnson that should she see Clark leave the Lounge and enter a taxi, Johnson was to drive Clark's car to 101st Street and Broadway where appellant would give her other directions (55). The record does not reveal whether appellant was in the car when Clark made this assertion to Johnson, or whether appellant overheard it and if he did, how he reacted. In any event, appellant never performed as Clark had allegedly predicted since Clark himself and still another unidentified male returned to the car and drove to still another location. After Clark's now familiar departure and return - this time with the third man - he gave Johnson the package of cocaine (55-6).

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* The judge told the jury that the statement was being received "subject to connection" (54).

At the close of the Government's case trial counsel moved for a judgment of acquittal (98). The judge granted the motion as to counts 2 and 3 and denied it as to counts 1 and 4 (105). The defense rested (109). Counsel's motion to strike all the hearsay evidence was denied (112).

The judge charged* the jury that on the issue of a defendant's participation it was, in fact, to consider the acts and declarations of all the alleged participants (170).

The jury returned during its deliberations to ask, inter alia, for the judge's charge on the "absence of testimony" and on "presence as against participation."**

After further deliberation the jury returned its verdict acquitting appellant of count 4, but convicting him of the conspiracy charge in count 1 (196).

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* The entire charge is annexed as "C" to appellant's joint appendix.

** The jury also asked for a re-reading of portions of the grand jury minutes (184-5).

POINT ONE

THE NON-HEARSAY EVIDENCE AS TO APPELLANT'S PARTICIPATION IN THE CONSPIRACY WAS INSUFFICIENT TO PERMIT ADMISSION OF THE CO-CONSPIRATOR HEARSAY DECLARATIONS AGAINST HIM.

Before the hearsay declarations of a conspirator can be used as evidence against another, the Government must establish by proof aliunde that a conspiracy existed and that the accused participated in it. Glasser v. United States, 315 U.S. 60, 74 (1942). The Supreme Court has recently indicated that to be sufficient, the quantum of this independent evidence must be substantial enough to take the question to the jury. United States v. Nixon, 94 S.Ct. 3090, 3104, n. 14 (1974);* see also, United States v. Spanos, 462 F.2d 1012, 1014 (9th Cir. 1972); United States v. Vaught, 485 F.2d 320 (4th Cir. 1973); United States v. Santos, 385 F.2d 43, 45 (7th Cir. 1967), cert. denied, 390 U.S. 954 (1968). Without the hearsay evidence, the Government

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* This Court's rejection of the prima facie evidence test and adoption of a lower standard (United States v. Geaney, 417 F.2d 1116, 1119-20 (2d Cir. 1969), cert. denied sub. nom. Lynch v. United States, 397 U.S. 1028 (1970) citing United States v. Ross, 321 F.2d 61, 68 (2d Cir. cert. denied, 375 U.S. 894 (1963)), is no longer good law. It is significant that the Supreme Court in adopting the prima facie test does not cite to any Second Circuit authority. United States v. Nixon, supra, 94 S. Ct. at 3104, n. 14.

failed to show that appellant participated in Clark's dealings with Johnson.* The evidence established only that appellant was present during but one drug transaction when the conspiracy lasted for eight months and included other transactions.

Specifically the proof established that sometime prior to October 17, 1973, Detective Johnson had developed a liason with Clark whom she found to be a trustworthy cocaine supplier. In fact, Johnson's declination of Wiley's

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* Even when assessed by this Court's lower "fair preponderance" standard, this case will not pass muster. On facts less compelling than those present here, this Court has reversed conspiracy convictions because the non-hearsay evidence establishing knowing presence, was not sufficient. United States v. Fantuzzi, 463 F.2d 683 (2d Cir. 1972); United States v. Stomberg, 268 F.2d 256 (2d Cir. 1959); see also, United States v. Cirillo, 449 F.2d 872, 884 (2d Cir. 1974). In United States v. Fantuzzi, supra, 463 F.2d at 689, the evidence established that Bruno, an alleged co-conspirator, was twice present in the apartment where the cocaine deals took place, the other members of the conspiracy were very familiar with him, and continued sniffing cocaine in his presence. Moreover, in Fantuzzi, the Government presented evidence to establish Bruno's proprietorship in the deal by his expressed concern when he saw a stranger in the apartment.

Similarly, in United States v. Stromberg, supra, 268 F.2d at 267, the presence of Samnick and Danis, both customs inspectors, during the conspirators' discussions about narcotics smuggling coupled with the "hypothetical" statements of each inspector as to how best to smuggle merchandise through customs, was nonetheless found to be insufficient proof aliunde of their participation in the conspiracy.

offer to supply the cocaine was premised on her knowledge that Clark was the one who would "guarantee" his merchandise. Clark's modus operandi in accomplishing his sales is revealed in detail in the course of the two transactions on October 17 and 24.

Each time Johnson met Clark at the Blue Rose Bar. From there Clark and Johnson would drive to various locations on the upper west side of Manhattan. At each location, Clark, sometimes alone, more frequently accompanied by varying unidentified men, would leave the car for a short while and then return either with information about future deliveries, or the cocaine. Secure in the reliability of his customer, Clark would leave Johnson alone in the car, and on one occasion gave her the car registration in case it was needed. At all times Clark did the negotiations, the investigations, and all the talking. Whatever role, if any, was played by the several unidentified men was never established.

The transaction which occurred on October 31, 1973, was no different from the earlier deals, except that appellant, appearing for the first time as still another unidentified man, was introduced to Johnson as "Nat." Appellant, like the others was present during Johnson's negotiations with Clark and a passenger in the now familiar drive to several

west side locations. Like his predecessors, at one time he accompanied Clark when he left the car and one time he remained in the back seat. Clark's alleged assertion to Johnson on his second departure from the car that if necessary appellant would direct her from 101th Street is propative of nothing. No where in the record does it appear that appellant overheard this assertion, nor, if he did, how he reacted to it. Even if he were sitting in the car at the time, his place was in the back seat and Johnson, as indicated by the void in her testimony, did not see appellant's response. United States v. Fantuzzi, supra, 463 F.2d at 890.

Critically, there is absolutely no evidence that appellant at any time participated in the negotiations for the cocaine sale nor that he ever did any act which could be construed as participation in the deal.

The Government's proof of appellant's knowing presence at the scene of the crime is simply insufficient to establish the requisite prima facie case that he participated in the conspiracy.* Judge Canella's decision to the contrary and his submission of the hearsay for the jury's consideration mandates reversal.

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* Presence in a car during the commission of a crime will not even establish probable cause to arrest. United States v. DiRe, 332 U.S. 581, 593 (1948).

POINT TWO

THE JUDGE'S INSTRUCTION ON THE JURY'S USE OF HEARSAY EVIDENCE AGAINST APPELLANT TOLD THE JURORS THAT THE JUDGE HAD FOUND APPELLANT GUILTY OF THE CONSPIRACY BEYOND A REASONABLE DOUBT.

Early in the Government's case, when trial counsel objected to the admission of hearsay evidence against appelland, the judge extemporaneously instructed the jury with respect to conspiracy law. During the course of that instruction, the judge told the jurors that before allowing them to consider the hearsay evidence as proof of appellant's guilt, he would decide if the Government, by evidence independent of the hearsay, had proved appellant's participation in the conspiracy beyond a reasonable doubt. The judge explained that if the Government satisfied that burden, he would instruct the jury to consider the hearsay. By contrast, he told them that if, at the end of its case, he found that the Government had failed to meet this standard, he would instruct the jury to disregard the hearsay. He explained further that, for the present he would let the evidence in "subject to connection."

At the conclusion of the evidentiary portion of the trial, as part of the main charge, Judge Canella told the jurors that the hearsay statements were evidence to be considered in determining appellant's guilt.

As a result of these instructions, the jurors were necessarily told that the judge had found beyond a reasonable doubt, and without reference to the hearsay evidence, that appellant had participated in the conspiracy. Because the jurors were told that the judge had found guilt beyond a reasonable doubt without the hearsay, the jurors were compelled to agree when they considered the additional evidence.

CONCLUSION

FOR THE FOREGOING REASONS THE JUDGMENT OF CONVICTION MUST BE REVERSED AND THE CASE REMANDED WITH DIRECTION TO ENTER A JUDGMENT OF ACQUITTAL; IN THE ALTERNATIVE THE CASE MUST BE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

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April 28, 1975

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Certificate of Service

April 28, 1975

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